

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

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In the matter of:

DELPHI CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

August 17, 2009

10:08 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re Objections to Notices of Nonassumption, Cure Amounts  
and Assumption and Assignment of Executory Contracts and  
Unexpired Leases

HEARING re Objection of American Aikoku Alpha, Inc. to Notice  
of Nonassumption under the Modified Plan with Respect to  
Certain Expired or Terminated Contracts or Leases Previously  
Deemed to be Assumed or Assumed and Assigned under Confirmed  
Plan of Reorganization

HEARING re Objection of Spartech Corporation and Spartech  
Polycom, Inc. to Dip Holdco 3, LLC's Assumption and Assignment  
Notice

HEARING re Notice of Filing of Notices of Assumption and  
Assignment with Respect to Certain Executory Contracts or  
Unexpired Leases to be Assumed and Assigned to Parnassus  
Holdings II, LLC Under Modified Plan of Reorganization

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Please be seated. Okay. Delphi Corporation?

MR. LYONS: Good morning, Your Honor. John Lyons on behalf of the debtors. And I have here also with me Carl Tullson, my colleague, and Dean Unrue and Karen Kraft from the company and then on the line, Michael Perl from Skadden as well.

THE COURT: Okay.

MR. LYONS: Your Honor, we are here today to have the first hearing on certain objections to nonassumptions of certain contracts and leases and assumption and assignment of executory contracts and unexpired leases and cure amounts under the modified plan. Before we get into the one contested matter for today, I'm happy to report that we have made progress and we have resolved a number of the objections that are outstanding. So far, we've resolved seventeen objections filed by fifteen parties. We will have -- we still, however, have objections of thirty-seven parties that have been adjourned to August 28th and the objections of eight parties that are being adjourned to the September 24th hearing. And if Your Honor would check off the agenda, that would cover on our agenda that we filed with today, that would cover items 2 through 13 on the agenda.

Item number 2, which was previously noticed as a

1 contested matter, has been resolved, that of Spartech.

2 THE COURT: The Spartech one?

3 MR. LYONS: Spartech was resolved over the weekend,  
4 Your Honor.

5 THE COURT: Okay. Okay.

6 MR. LYONS: So, again, that leaves for today the  
7 objection of American Aikoku Alpha, Inc. And we're prepared to  
8 argue that. We did have a meet and confer over the weekend and  
9 the parties have agreed on a joint exhibit binder that would be  
10 admissible for all purposes which Your Honor has.

11 THE COURT: Okay.

12 MR. LYONS: So we will just argue from that as  
13 appropriate.

14 THE COURT: Okay.

15 MR. LYONS: Okay. Without anything further, Your  
16 Honor, I'll proceed on the American Aikoku objection.

17 THE COURT: All right.

18 MR. LYONS: American Aikoku filed three virtually  
19 identical objections to the modified plan. One was to the  
20 modified plan and one was relating to two contract related  
21 objections arguing that a prior stipulation entered into  
22 between the debtors and American Aikoku in connection with the  
23 sale of the steering business, a transaction that was never  
24 consummated with Platinum Equities -- Your Honor is aware from  
25 the last modification hearing -- would require the debtor to

1 pay cure for a certain purchase order. The purchase order at  
2 issue and it's stated in our papers is PO SAG901I2815. I will  
3 refer to that, Your Honor, as appropriate, the pre-petition or  
4 the post-petition purchase order. It -- for adminis -- as we  
5 stated in our papers, Your Honor, it is the debtors' contention  
6 that the parties entered into a new post-petition purchase  
7 order in January 2008. It referred to the same number for  
8 administrative convenience purposes only. And we delineated  
9 the two different POs in our papers. The PO that controlled  
10 the kind of business before January 2008, we call the pre-  
11 petition purchase order. And the purchase order that governed  
12 the relationship between the parties after that date, we'll  
13 refer to as the post-petition purchase order.

14 THE COURT: Okay.

15 MR. LYONS: With respect to the pre-petition purchase  
16 order, the debtors entered into this order January 14, 1997 and  
17 it had an expiration term of December 31st, 2010. And, Your  
18 Honor, that is referenced in Exhibit number 13 in the joint  
19 exhibit binder. That would be the pre-petition purchase order.

20 THE COURT: Okay.

21 MR. LYONS: On January 28th, the debtors and American  
22 Aikoku entered into a new post-petition purchase order, which  
23 is referenced in the exhibit binder as Exhibit number 14,  
24 through various alterations. And the alterations are contained  
25 at Exhibits 15 through 20 in the exhibit binder. That changed

1 various aspects of the master purchase order.

2 In particular, the amendments and the new purchase  
3 order contained a clause, which I'll refer to as the 180  
4 clause -- that was a term of art Delphi's GSM used for this  
5 clause -- which basically said this is a new purchase order.  
6 It amends, supersedes and replaces any other previous purchase  
7 order and, in particular, it will cut off the ability of the  
8 other contract party to seek any cure. And conversely, with  
9 respect to the debtor, it would be a post-petition  
10 administrative purchase order and would not be subject to  
11 assumption or rejection.

12 So, again, when this purchase order was issued and  
13 the alteration was issued, the clause contained that language  
14 that made it clear that the post-petition purchase order would  
15 not be subject to assumption or rejection nor would the other  
16 counterparty be entitled to a cure payment since the contract  
17 could no longer be assumed.

18 Your Honor, this was issued and sent to American  
19 Aikoku and the parties operate under that purchase order. In  
20 particular, American Aikoku did ship product against that  
21 purchase order and was paid in accordance with the new terms.  
22 It's the debtors' contention that under applicable law,  
23 acceptance by performance is recognized in Michigan and under  
24 the Michigan UCC which is the controlling law here. And I  
25 believe Your Honor may even have ruled that in one of the other

1 matters we had before Your Honor during the claims process.

2 So it's the debtors' view that as of January 2008,  
3 the parties had a post-petition agreement. There no longer was  
4 a pre-petition agreement since that pre-petition agreement had  
5 been replaced and superseded by the express terms of the 180  
6 clause and, therefore, there is no ability of the debtor to  
7 assume that contract nor is there any right of American Aikoku  
8 to be paid cure.

9 Now, of course, Delphi certainly has the rights to  
10 assign the post-petition purchase order. That is in accordance  
11 with the terms of the contract and not under any power under  
12 365 of the Bankruptcy Code.

13 So, Your Honor, we believe it's rather  
14 straightforward that the clear intent of the parties as  
15 referenced in the 180 clause and as accepted by American Aikoku  
16 through acceptance of performance renders the purchase order at  
17 issue a post-petition contract not subject to assumption nor  
18 any right is there for American Aikoku to demand cure.

19 THE COURT: Okay. Could I ask you why -- I mean,  
20 this again is based upon -- American Aikoku's claim and  
21 objection is based upon the stipulation and order from May  
22 2008. Are the debtors still relying on the argument that that  
23 stipulation and order doesn't apply to this transaction?

24 MR. LYONS: Yes.

25 THE COURT: You are?



1 MR. LYONS: Yes.

2 THE COURT: So this is an additional argument that  
3 you've just made.

4 MR. LYONS: Yes.

5 THE COURT: Not the only argument.

6 MR. LYONS: Right. Well -- correct, Your Honor.  
7 Yeah. The stipulation, again, as Your Honor's ordered, is not  
8 effective 'cause the sale with Platinum Equity never closed.  
9 But in order to show -- 'cause I know Mr. Vist had mentioned  
10 that he believed the contract had not yet expired. And the  
11 additional evidence and the arguments we presented in our reply  
12 show that that contract was amended and superseded and replaced  
13 by a post-petition purchase order.

14 THE COURT: Okay. Is this a contract that -- well,  
15 the January 2008 PO as altered, that's something that the  
16 debtors do propose to assign to the buyer under its terms or is  
17 it -- yes?

18 MR. LYONS: Yes --

19 THE COURT: Okay. All right.

20 MR. LYONS: -- in accordance with its terms.

21 THE COURT: Okay. All right. Very well.

22 MR. LYONS: Your Honor, I have nothing more unless  
23 Your Honor has questions and I'll yield the podium to Mr. Vist.

24 THE COURT: Okay.

25 MR. VIST: Good morning, Judge.

1 THE COURT: Good morning.

2 MR. VIST: Gary Vist for American Aikoku. To address  
3 the latest argument from counsel, we do believe that the  
4 stipulation that has been entered in May of 2008 obviously came  
5 after the alleged January 29, 2008 change in the purchase  
6 order. The Exhibit 14 that counsel was referring to actually  
7 doesn't have a date on it. Exhibits 15 through 20 does but  
8 Exhibit 14 does not. But taking what counsel has stated as  
9 true that the PO has changed in January of 2008, obviously, if  
10 that was the case and if Delphi, as counsel stated, had no  
11 ability to assume the pre-petition contract as of January 29,  
12 2008 date then the question is why was Delphi actually  
13 including that purchase order and assuming it and issuing cure  
14 payment for it in the May 2008 stipulation.

15 We believe that the stipulation would actually  
16 trump -- the terms of the stipulation would trump counsel's  
17 argument. We do believe that this purchase order has been  
18 assumed through the stipulation. And the arguments are if you  
19 look at Exhibit 10, which is a copy of one of American Aikoku's  
20 objections -- Exhibit C to it is the copy of the stipulation.  
21 The stipulation does provide, and we did discuss it at the  
22 prior hearing, that "As soon as reasonably practical upon the  
23 closing of the sale of the steering and half-shaft business,  
24 American Aikoku shall receive a cure payment of approximately  
25 414,000 dollars to cure all defaults under the purchase

1 orders."

2 Again, the stipulation was not contemplated to apply  
3 only to a sale that was pending at that point. There is no  
4 mention that it is pending -- that it is only pertinent to the  
5 sale that was pending at that point. It's not limited to a  
6 particular buyer. None of the terms are capitalized to  
7 indicate that it is limited to a particular buyer. It was  
8 American Aikoku's understanding that by entering into this  
9 stipulation, whenever the steering business is going to be sold  
10 then the cure payment would be made.

11 THE COURT: What evidence is there on that?

12 MR. VIST: Basically, again, other than discussions  
13 among me and Mr. Tullson, the evidence from our perspective is  
14 that none of the terms are capitalized. The stipulation is not  
15 limited to a particular sale. Also, item 3 --

16 THE COURT: What about the title of the stipulation?

17 MR. VIST: Well, it's in connection with sale of  
18 steering and half-shaft business.

19 THE COURT: To buyers. It's resolving an objection  
20 to a specific transaction.

21 MR. VIST: Well, it says to buyers. It doesn't say  
22 that it's limited to a particular buyer. At least that is our  
23 argument.

24 Also, item 3 of the "Therfores" in the stipulation on  
25 page 7 says that "upon the Court's entry of the stipulation,

1 American Aikoku shall be deemed to have withdrawn with  
2 prejudice the first steering objection and the second steering  
3 objection. Those two objections dealt with assumption issues  
4 and with the cure amounts. We have withdrawn them with  
5 prejudice, and we can no longer assert them, again, through  
6 discussions with counsel.

7 THE COURT: Well, let me pursue that.

8 MR. VIST: Sure.

9 THE COURT: So your contention is that if the debtors  
10 propose to assign this contract for whatever consideration they  
11 were going to get --

12 MR. VIST: Yes.

13 THE COURT: -- to a buyer that American Aikoku didn't  
14 believe could provide adequate assurance of future performance,  
15 a different buyer than these people, to say, I don't know,  
16 Chrysler, the day before it was going to file for Chapter 11,  
17 you contended American Aikoku had waived all of its objections  
18 to the assignment of that contract?

19 MR. VIST: Well, what we believe we had withdrawn  
20 with prejudice is the objections to the assignment and to the  
21 cure. I think the 365 objections would be a separate animal  
22 that we would deal with if a buyer was deemed to be  
23 problematic. I still believe even with the sale to Platinum,  
24 if it had gone through, had American Aikoku believed that that  
25 was a problematic buyer, I still think we would have preserved

1 the 365 objection. But they wouldn't be able to object to the  
2 assumption or to cure.

3 THE COURT: Okay. But there wasn't a sale to  
4 Platinum.

5 MR. VIST: Correct.

6 THE COURT: All right.

7 MR. VIST: But again, our position is that the  
8 stipulation is not limited to a particular sale, that this was  
9 a stipulation entered for the sale of the steering business of  
10 Delphi to a prospective buyer, whoever that buyer is going to  
11 be.

12 Our position also is that the notice of  
13 nonassumption, under which we are here today, it lists this  
14 particular purchase order -- it actually doesn't say whether  
15 it's a pre-petition number or a post-petition number and this  
16 hearing is basically the first time that I hear that we've got  
17 a pre-petition and a post-petition division of the same  
18 purchase order number. But it says -- the title of the notice  
19 is "Notice of Nonassumption under the Modified Plan with  
20 Respect to Certain Expired or Terminated Contracts or Leases  
21 Previously Deemed to be Assumed or Assumed and Assigned under  
22 Confirmed Plan of Reorganization". So by the debtor including  
23 this PO on the notice, the debtor is agreeing that this PO has  
24 been assumed or assumed and assigned.

25 THE COURT: No. But -- that seems particularly

1 facile to me. I mean, the plan of reorganization they're  
2 referring to never went effective.

3 MR. VIST: I understand. But it shows that they have  
4 assumed this contract. They're now trying to nonassume. If it  
5 hasn't been assumed, as they're arguing, they wouldn't even be  
6 including it in the notice of nonassumption because the notice  
7 of nonassumption is limited to contracts that have previously  
8 been assumed. They have assumed this contract. I understand  
9 what they're trying to do now. They're trying to get out of  
10 that assumption. And obviously, the nonassumption and the  
11 modified plan gives them the right to do so if there is a  
12 rejection, if there is a termination, if there is expiration.  
13 My argument is they cannot do it with respect --

14 THE COURT: Is the only point you're making that this  
15 contract really wasn't superseded by the January 2008 purchase  
16 order?

17 MR. VIST: Correct.

18 THE COURT: Okay. I understand that point.

19 MR. VIST: Yes. And therefore, we believe that the  
20 stipulation does control. And item 5 says "To the extent any  
21 order related to the sale of the steering and half-shaft  
22 business" -- again, no capitalization -- "alters, conflicts  
23 with or derogates from the provisions of this stipulation, this  
24 stipulation shall control." So we believe that this contract  
25 has been assumed. We believe that the cure amount is due. We

1 have withdrawn our objections to the assumption and to the cure  
2 amounts with prejudice and therefore we believe we're  
3 entitled -- you know, four of the five purchase orders are  
4 being assumed and assigned to GM. This is the first time I  
5 hear that, again, the post-petition PO is actually also being  
6 assigned. We received no notice of that. The only thing we  
7 received is the notice of nonassumption which lists, obviously,  
8 the same purchase order number. And therefore, we believe that  
9 we're entitled to the full cure amount and we intend to perform  
10 going forward under those circumstances under all five purchase  
11 orders.

12 THE COURT: Okay. As I look through this exhibit,  
13 it's all documentary, right? There's no declaration, there's  
14 no witness here today for me to decide as to what was intended  
15 by either the January 2008 purchase order or the May 2008  
16 stipulation?

17 MR. VIST: Not from our side. I'm the only one  
18 that's involved in this.

19 THE COURT: Okay.

20 MR. VIST: I can't speak for Mr. Lyons.

21 THE COURT: Okay. All right.

22 MR. VIST: Thank you, Judge.

23 MR. LYONS: Very quickly. I mean, again, I think the  
24 only evidentiary issues which are undisputed is that the post-  
25 petition purchase order was issued. American Aikoku actually

1 produced it back to us and that the parties performed under  
2 that post-petition purchase order. I mean, it's all set forth  
3 in our reply. I don't think there's a need for a proffer. We  
4 do have Mr. Unrue here if necessary.

5 THE COURT: But -- I understand that but that kind of  
6 leaves open that if that was the case, why would the debtors  
7 bother to do the May 2008 stipulation? I mean, if the parties  
8 had agreed to waive any cure claims, why would they then  
9 provide for payment of the cure claims in the May 2008  
10 stipulation?

11 MR. LYONS: Your Honor, to be blunt, it was a  
12 mistake. There were hundreds of thousands of purchase orders  
13 that Delphi is routinely updating, amending and superseding and  
14 the claims cure team would take new data from GSM, which would  
15 be Global Supply Management, which would be refreshed. And,  
16 frankly, that's why the stipulation ultimately was entered. It  
17 should have been -- if we were able to check the nanosecond  
18 that that contract was amended and superseded, Delphi would  
19 have caught it. But it just slipped through basically.

20 THE COURT: But counsel is saying it wasn't a mutual  
21 mistake. I mean, if it was just one party's mistake, it would  
22 seem to me that, at least conceivably, the stipulation could  
23 amend the terms of the PO as far as the cure amount goes.

24 MR. LYONS: Well, but, Your Honor, the stipulation  
25 didn't deal with the contracts. The stipulation dealt with the



1 contracts as they were. I mean, Delphi has all automotive  
2 purchasers. They have very strict purchasing terms and  
3 conditions, guidelines as to how contracts are amended, how  
4 contracts are superseded. Delphi issued the three alterations  
5 in accordance with the Global Supply Management system to amend  
6 those contracts. Certainly, American Aikoku had all these  
7 amendments and alterations as well since they then had those  
8 and then shipped against them. So if you look at what was the  
9 contract of the parties, you have to look at those documents.

10 THE COURT: But if you rely -- I mean, this hasn't  
11 been briefed but if you're relying on a course of dealing and  
12 course of performance, can't that be altered by a subsequent  
13 agreement?

14 MR. LYONS: Well, it needs to be an alteration made  
15 in accordance with Delphi's terms and conditions which American  
16 Aikoku has agreed to do. And it must be in writing by the  
17 buyer to alter or change any purchase order.

18 THE COURT: But couldn't this stipulation constitute  
19 an alteration?

20 MR. LYONS: Well, Your Honor, no, because when the  
21 parties entered into the modification in January of 2008, it  
22 was agreed that this is a new post-petition contract. I don't  
23 think Delphi could then agree down the road and say no, it's a  
24 pre-petition contract because to do so, Your Honor, would, in  
25 essence, try to pay a pre-petition claim without authority.

1 THE COURT: Well, I understand that point.

2 MR. LYONS: I mean, we just wouldn't have had the  
3 power to have done it. But --

4 THE COURT: But that's a 549 issue, though.

5 MR. LYONS: Well, it would be a 549 issue. And, Your  
6 Honor, back to the first point, I mean, I know this was argued  
7 extensively at the plan modification hearing, and I'm happy to  
8 rehash Mr. Butler's arguments, but I think it's clear from the  
9 face of the stipulation this thing was conditioned upon the  
10 sale to Platinum.

11 THE COURT: No. I agree with that. I don't have --

12 MR. LYONS: And the stipulation --

13 THE COURT: I don't have any sympathy for that point.  
14 But there is an agreement that the debtors want to assign,  
15 right?

16 MR. LYONS: Yes.

17 THE COURT: I mean, this fourth purchase order  
18 that's -- there's roughly, what is it, 200 -- if one assumes  
19 that the January 2008 purchase order was subsequently modified  
20 by this stipulation then there would be a cure, according to  
21 American Aikoku, of 275,000 dollars. And if that was what the  
22 debtor was proposing to assign to the buyer under the modified  
23 plan, then the debtor would have to pay that. On the other  
24 hand, if what is being assigned is the post-petition contract  
25 with the waiver of the cure claim then you don't have to do it.

1 And I think that's separate and apart from an argument which I  
2 don't accept that this stipulation was intended to be binding  
3 under any transaction whereby the steering business was sold.

4 MR. LYONS: Right.

5 THE COURT: I just don't -- that's not -- for the  
6 reasons I said in July, I don't think that's how this could be  
7 read given the context of it including the recitals in it. But  
8 that still, I think, leaves the issue of what is the agreement  
9 that the debtors are proposing to assign to the buyer. And I  
10 understand your argument. The 2008 purchase order is very  
11 clear and Michigan law is clear that it can be binding if the  
12 parties perform. But then there's this subsequent stipulation  
13 which suggests that the parties still treated the other  
14 contract as having an existence and a cure amount --

15 MR. LYONS: Well, Your Honor.

16 THE COURT: -- that would need to be paid upon an  
17 assignment.

18 (Pause)

19 MR. LYONS: I mean, Your Honor, the stipulation  
20 itself, it really doesn't purport to amend or any way modify  
21 the parties' agreement. I mean, the parties' agreement was the  
22 January 2008 agreement which, again, was a new post-petition  
23 contract. I mean, it was -- frankly, Your Honor, it was just  
24 issued in error. There was -- again, as I said, Delphi had a  
25 database which was trying to talk to the other database and --

1 THE COURT: But does that matter? I mean, if  
2 American Aikoku wasn't taking advantage of you and didn't know  
3 about -- assumed this was not a mistake then does it matter?

4 MR. LYONS: Well, no. I don't think they could have  
5 relied on that stipulation to amend the parties' contract. The  
6 only way a contract could be modified was in accordance with  
7 Delphi's terms and conditions.

8 THE COURT: But how would --

9 MR. LYONS: And they agreed to abide by those terms  
10 and conditions.

11 THE COURT: But then what was the point of entering  
12 into it? I mean, it was a mistake, you're saying?

13 MR. LYONS: Yes.

14 THE COURT: Well, I mean, I'm not prepared to rule on  
15 this point. I think that there's --

16 MR. LYONS: Okay.

17 THE COURT: -- more to it that I would need to hear.  
18 And among other things, there's the 549 issue --

19 MR. LYONS: Right.

20 THE COURT: -- as to whether notwithstanding that  
21 this is set out in the form of a stipulation approved by the  
22 Court whether it -- as reflective of facts that weren't  
23 described to the Court is an improper modification of --  
24 improper post-petition transaction that would be avoidable. It  
25 doesn't say anything about modifying an earlier purchase order,

1 in other words. So the issue is whether that effect of the  
2 stipulation was something that the debtor didn't obtain proper  
3 permission to do.

4 MR. LYONS: Well --

5 THE COURT: I mean, I think that's a legitimate  
6 point. I mean -- in other words, if you're transacting with a  
7 debtor, there may be a circumstance where you don't have to  
8 have a mutual mistake to render the post-petition transaction  
9 void since you're not transacting just with the debtor, you're  
10 transacting with a whole process of court approval and -- I'm  
11 not prepared to rule on that today but it seems to me that is  
12 another issue that the parties should consider.

13 MR. LYONS: Well, let me -- Your Honor, I guess --  
14 for purposes of, though -- even if we were unable to enter into  
15 that stipulation because there was no cure and then there was  
16 no pre-petition agreement to cure --

17 THE COURT: Right.

18 MR. LYONS: -- that would end up with no cure claim.

19 THE COURT: Well, I understand. It would be  
20 avoidable.

21 MR. LYONS: And secondly --

22 THE COURT: But on the other hand, there may be  
23 evidence out there to the effect that the parties fully -- they  
24 may have been completely aware of the January 2008 purchase  
25 order's provision but nevertheless meant to vary it pursuant to

1 this stipulation. But --

2 MR. LYONS: Well, the terms of the stipulation do not  
3 purport to vary the contract. I mean, that -- and that's  
4 before Your Honor.

5 THE COURT: Well, I understand. I understand.  
6 That's why I think probably 549 would apply.

7 MR. LYONS: Right. So -- but in either outcome, Your  
8 Honor, I think at the end of the day, Your Honor would hold  
9 that there is no contract that is subject to assumption either  
10 because under 549 the stipulation shouldn't have been entered  
11 into or the stipulation is, frankly, as Your Honor has already  
12 ruled is not effective because the sale never closed with  
13 Platinum Equity.

14 THE COURT: Well, that's on the first argument that  
15 Aikoku makes. But I don't think that goes to the second one.  
16 'Cause it recognizes an agreement. I mean, it purports to  
17 recognize an agreement that the debtors contend didn't exist at  
18 that time. So, I mean, there's an inconsistency there.

19 MR. LYONS: But there is no evidence in the record,  
20 Your Honor, and certainly, I would think American Aikoku would  
21 have put it in if they somehow thought that this was an  
22 amendment to that January purchase order.

23 THE COURT: Well, but they contend that they didn't  
24 know that this -- I mean, it could have been completely  
25 academic. If the debtors don't intend to assign this contract,

1 it's an academic issue. It doesn't matter. If they do intend  
2 to assign it, which was just stated, then I think it does  
3 matter because what is the contract intended to be assigned at  
4 that point? Is it the 2008 purchase order or is it the -- or  
5 was that purchase order subsequently revised pursuant to the  
6 stipulation? Not that the -- again, not that the stipulation  
7 means that the debtors must assign the contract. But if they  
8 choose to assign a contract, what is that contract? That's the  
9 remaining open issue, I think.

10 MR. LYONS: And the contract would be -- well, I  
11 don't think there's any --

12 THE COURT: And the debtors contend it's the 2008 PO,  
13 the January 2008 PO, and American Aikoku says, well, not so  
14 fast because it looks like that PO was amended pursuant to this  
15 agreement which still seemed to recognize an efficiency claim.

16 MR. LYONS: Certainly -- well, Your Honor, the  
17 stipulation itself does not purport to amend the contract and  
18 the January modification. But I suppose Your Honor --

19 THE COURT: It doesn't address it at all. It doesn't  
20 say anything about the January modification which is why maybe  
21 549 applies.

22 MR. LYONS: Okay, Your Honor. I understand your  
23 ruling and what Your Honor --

24 THE COURT: Well, it's not a complete ruling. I'm  
25 just saying I'm not ready to address that second level issue

1 today. I think that neither side is really focused for  
2 understandable reasons. I'm not faulting either side for  
3 this -- on what I think are two remaining issues, legal issues.  
4 One is, under Michigan law, what does it take to modify an  
5 acceptance by performance of a PO like this which I -- you  
6 know, based on what's before me, it would appear to me to be  
7 the case that the PO was accepted by performance.

8 MR. LYONS: Yes.

9 THE COURT: On the other hand, it may have been  
10 modified by the May 2008 stipulation. I don't know. That's an  
11 issue in Michigan law and I don't know what it would take in  
12 terms of the writing or agreement to modify an agreement that  
13 had been previously accepted by performance. That's one issue.

14 The second issue is given that the January 2008 PO  
15 had a very important modification in it of the debtors' and  
16 American Aikoku's rights whereby any deficiency claim would not  
17 count anymore as far as an assignment was concerned which, in  
18 this case, is a 275,000 dollar issue. Does the failure to  
19 disclose that the PO had been accepted by performance or that  
20 it existed -- does that render this May 2008 stipulation  
21 voidable under Section 549 of the Bankruptcy Code? Because  
22 clearly, it would seem to me that it would be out of the  
23 ordinary course to waive a right not to have to be paid 276,000  
24 dollars -- or, in fact, the entire stipulation is bigger than  
25 that. It's 415,000 dollars. That would seem to me out of the



1 ordinary course and wasn't really considered, wasn't on notice  
2 to anybody, effectively. So that's a second issue.

3 Now, maybe American Aikoku can say something on that  
4 legal theory -- and the debtors certainly haven't brought  
5 anything under 549 either. But it would seem to me that that's  
6 a second thing that I'd want to hear about before I ruled on  
7 what contract is properly the contract that is subject to  
8 assignment to the buyers.

9 And if American Aikoku can point to some other  
10 documents or evidence of waiver, I think that's fair -- you  
11 know, waiver of the rights under the 2008 agreement.  
12 Certainly, these documents don't do it as far as I can see.  
13 I'm not particularly moved by the notice of rejection.

14 MR. LYONS: And if, though, Your Honor did find that  
15 it was voidable -- the stipulation --

16 THE COURT: Well then, that's easy. That is --

17 MR. LYONS: Then that's easy?

18 THE COURT: Yeah.

19 MR. LYONS: But if it were not voidable then you  
20 still have -- it was conditioned upon the closing to Platinum  
21 Equity. And since that never occurred, I guess the  
22 stipulation's ineffective.

23 THE COURT: No. But again, I'm not -- and I will  
24 rule on the first of -- I might as well do it today even though  
25 there won't be an order on this until both issues have been

1 covered. But I do not believe, based on my reading of the May  
2 stipulation and its context, which includes the Bankruptcy Code  
3 as a whole, that you can read that stipulation as saying that  
4 any transaction involving the sale of the steering business  
5 will be one pursuant to which these contracts will be assumed  
6 and assigned and the cure payments will be made. I don't  
7 believe that's the case. I don't believe that the parties were  
8 agreeing to subject themselves to that much commitment to  
9 uncertain facts. I don't think American Aikoku was agreeing to  
10 say it was withdrawing its objection to the assignment to  
11 anybody. And similarly, I don't believe the debtor was  
12 agreeing -- and certainly, the creditors weren't withholding  
13 their objection that this contract must be assigned to anyone  
14 that's buying the steering business with the related cure.  
15 So -- and that's where your arguments about Platinum come in.  
16 I think it was limited to the two notice for Platinum sales  
17 since it resolved the objection to those sales.

18 On the other hand, again, I don't think the fact that  
19 it references and is effective upon a sale to Platinum really  
20 is dispositive on the issue of whether this contract itself was  
21 no longer in existence because it was being treated as if it  
22 was in existence in this stipulation. So --

23 MR. LYONS: The pre-petition contract, you mean.

24 THE COURT: Right, the pre-petition contract. So,  
25 again, I'm not ruling on that second point now. I think you

1 all ought to brief those two issues for me.

2 On the first issue -- again, I don't want to go over  
3 this a third time, but I believe that the context of this  
4 stipulation, this May 2008 stipulation, is set forth in the  
5 title and in the recitals -- is that it resolves an objection  
6 by American Aikoku to the assumption and assignment of  
7 executory contract to the buyers in connection with the  
8 proposed Platinum transaction. And there were two objections  
9 because the transaction was amended and it was noticed a second  
10 time. Each time it was a transaction involving a specific sale  
11 with specific consideration to the estate to Platinum. And  
12 that was the objection that -- those were the two objections,  
13 rather, that were resolved by this stipulation. And the -- I  
14 believe that the stipulation makes that clear in the references  
15 to the objections.

16 But more importantly, or as importantly, the debtors  
17 tied their -- the debtors did not purport to assume the  
18 contract at the time. It was conditioned upon the transaction  
19 occurring. American Aikoku contends, based on both the whereas  
20 clause at the bottom of page 6 as well as paragraph 5, that the  
21 cure payment would be made upon the closing of any sale of the  
22 steering and half-shaft business, although the word "any"  
23 doesn't appear in either of those paragraphs. However, it's  
24 based upon the fact that the sale of the steering and half-  
25 shaft business is not a defined term and so American Aikoku

1 contends can be read to encompass any sale. However, again, I  
2 wasn't approving and the debtors weren't asserting that they  
3 were -- and they hadn't moved for authority to assume and  
4 assign the contract upon any sale. Rather they were moving to  
5 assume and assign the contract, a specific sale to Platinum.  
6 And it was in that context that the cure payment of \$413,980.96  
7 was agreed upon.

8 This stipulation was not set up as approval of the  
9 assumption and assignment of the contract in connection with  
10 any sale of the steering and the half-shaft business. The  
11 debtors would have to obtain authority to assume and assign  
12 each time unless it pertained to the specific transaction where  
13 they had sought authority which was the Platinum proposed  
14 purchase of the steering and half-shaft business. The  
15 assumption and assignment of a contract is too important a  
16 transaction and too fact specific for this to be properly read  
17 as a blanket approval of assumption and assignment of the  
18 contract for either party but certainly for the debtors. So, I  
19 believe it can't be read as the Courts having granted approval  
20 of the assumption and assignment of the contract under any  
21 circumstances where the steering and half-shaft business were  
22 to be sold.

23 So that aspect of American' Aikoku's objection is  
24 denied. The remaining issue then is which contract is in  
25 existence at this point, the January 2008 purchase order as

1 performed including, I guess, with various alterations going  
2 through -- as set forth in Exhibits 15 through 20 and any other  
3 exhibits that might show a subsequent course of performance.  
4 Or was the provision dealing with a waiver of cure rights in  
5 the January 2008 purchase order modified by the stipulation  
6 somehow? And that if it was, is that a voidable under 549 of  
7 the Bankruptcy Code?

8 MR. LYONS: Okay, Your Honor.

9 THE COURT: I'm just not prepared on today's record  
10 to deal with those two issues. I think you can sort of tell  
11 where I'm leaning on it and consistent with my other ruling on  
12 this which is that the creditors and, ultimately, the Court are  
13 given more notice before a transaction as sweeping, as Aikoku  
14 contends this is, actually can be approved than was given here  
15 in connection with the May 2008 stipulation. So my leaning is  
16 to suggest that it is voidable under 549 but I don't think the  
17 parties have sufficiently addressed that issue.

18 MR. LYONS: Okay, Your Honor. Do you have any  
19 briefing date you'd like to have the supplemental briefs?

20 THE COURT: Two weeks from today? Is that going to  
21 give you enough time?

22 MR. LYONS: That's acceptable.

23 THE COURT: It's kind of the end of the summer. I  
24 know people are taking vacations or --

25 MR. LYONS: No -- would Your Honor require another

1 hearing or would you rule on the briefs or would you notify us  
2 if you wanted --

3 THE COURT: Well, it depends on whether the parties  
4 are just relying on documents or if they think that there's  
5 testimony that would be --

6 MR. LYONS: Okay.

7 THE COURT: -- relevant on this point. So I don't  
8 know yet.

9 MR. LYONS: Okay. So we will submit --

10 MR. VIST: We're fine with two weeks, Your Honor.

11 MR. LYONS: We'll exchange briefs.

12 THE COURT: Okay. Two weeks from today then.

13 MR. LYONS: And we'll then exchange briefs then.

14 THE COURT: Okay.

15 MR. LYONS: Great. Okay, thank you, Your Honor. I  
16 don't think there's anything else on this agenda.

17 THE COURT: Okay. Thank you.

18 MR. VIST: Thank you, Judge.

19 MR. LYONS: Thank you.

20 THE COURT: Okay. And once I get the briefs, I'll  
21 let you know whether I want a hearing or not.

22 MR. LYONS: Okay. Very good.

23 (Whereupon these proceedings were concluded at 10:51 a.m.)  
24  
25

I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Aspect of Aikoku's objection with respect	28	24
to their position that the stipulation		
is not limited to a specific sale,		
namely, the Platinum Equity sale		
transaction, overruled		

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET\*\*D-486)

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